law graduates are locally qualified and they should not generally be concerned with how the Parliament of England prescribes a procedure granting a right to the accused to make a statement from the dock or how and why such a right is modified or taken away by that Parliament.

Ruling accordingly.

PACKIRISAMY v. JANAGI

[A.C.J. (Sharma J.) May 15, 1970]

[Malacca — Civil Appeal No. 1 of 1970]

Practice and Procedure — Application to set aside order made in default of appearance — Illness of defendant — Discretion of trial judge — Subordinate Courts Rules, 1950, O. 19 r. 3.

The appellant applied to set aside an order made against him in his absence, whereby judgment was entered for the plaintiff in the action. The appellant stated that he arrived late at the court on the day fixed for trial as he had to go to see a medical practitioner to obtain a medical certificate. By the time he arrived in the court he was informed that the plaintiff had already obtained judgment against him. The appellant had filed his defence in which he had raised questions as to the competence of the plaintiff to file the action by her attorney and also a defence under the Moneylenders Ordinance. The learned president refused the application and the appellant appealed.

Held, allowing the appeal: in the circumstances of this case the learned president had not exercised his discretion in a judicial manner and what he did was in fact in complete disregard of the evidence he had before him.

Cases referred to:-

(1) *Safety Insurance Co. Ltd.* v. *Hua Seng Electric Co.* [1968] 1 M.L.J. 273.

(2) *Foo Chiew Fong* v. *Guriman* [1957] M.L.J. 51.

MAGISTRATE'S CIVIL APPEAL.

F. H. D'Cruz for the appellant.

P. Devadas for the respondent.

Sharma J. (delivering oral judgment): This is an appeal against the order of the learned president refusing the application of the first defendant to set aside the order made against him on the 6th day of January 1970 in his absence for reasons of the first defendant's illness. The summons was filed on the 24th day of November 1969 and the first returnable date mentioned in the summons was the 6th day of January 1970 itself. The first defendant filed his defence on the 18th day of December 1969 and in his defence raised questions of the competence of the plaintiff to file the action because the action was filed by her attorney and not by her personally. The first defendant alleged that the plaintiff was at all material times and at the time of the filing of the action a resident of Malacca. Order 5 rule 7 of the Subordinate Courts Rules deals with the matter. The other line of defence was under the Moneylenders Ordinance. In fact the plaintiff in the statement of claim admitted that she was a licensed moneylender and the transaction with the defendants was a moneylending transaction.

The action came up for mention on the 6th day of January 1970. At that time the second defendant had not been served and when the case was called the first defendant was absent. The learned president acting under the provisions of O. 19 r. 3(1)(b)(i) of the Subordinate Courts Rules entered judgment for the plaintiff. On the 13th day of January 1970 the first defendant made an application to the court to set aside the order of the learned president made on the 6th day of January 1970 and in support of his application filed an affidavit to the effect that he was suffering from flu and fever on the 6th day of January 1970 and for that reason could not attend the court at 9 a.m. Other grounds showing the merits of his defence were also disclosed in the affidavit. This application came up for hearing on the 17th day of February 1970 when the first defendant appeared through his counsel and the medical certificate Ex. P1 was produced. After hearing the counsel for the first defendant the learned president asked the plaintiff who seems to have only orally objected to the application and on that oral objection by the plaintiff (without any affidavit filed by him and without making any request to cross-examine the first defendant on his affidavit) the learned president dismissed the first defendant's application. In his grounds of judgment all he says is:

"In my opinion the reasons the defendant (1) gave were not sufficient to set aside the former order. If defendant (1) was really sick how was it possible for him to come to court later the same day. For this reason I dismissed the defendant (1)'s application."

All that the first defendant said in his affidavit was that he reached the court late and could not be present in court at 9 a.m. on the 6th day of January 1970 as he had gone to obtain a medical certificate from a medical practitioner and that by the time he arrived in court at 10 a.m. he was informed that the plaintiff had already obtained judgment in default against him. The second defendant had not on the 6th day of January 1970 been served and in my view it could not have in any way advanced the interests of justice if the default judgment given on the 6th day of January 1970 was not set aside. The promissory note in question which was the basis of the plaintiff's claim is alleged to have been signed by both the defendants. The interests of justice might have been better served if the action was heard after the second defendant had also filed his defence. Under the provisions of O. 19 r. 3(3)

"any judgment or order given or made in the absence of a party may, on his application and if good reason for such absence is shown, be set aside and the proceedings may be reheard upon such terms as to costs or otherwise as the court shall think fit."

The rule requires that a good reason should only be shown and all that the first defendant said was that he reached the court late because of his sickness. The mere fact that a person is suffering from flu or fever does not mean that he is not able to attend court. The first defendant's sickness may in fact be a reason why he gave priority to seeing a doctor than taking his person to court at 9 o'clock. He had not defied any order of the court. All that he did was that he thought it appropriate and best for him to look after his illness first and then go to court. The affidavit filed by the first defendant was not challenged at all and the learned

president has only made some conjectural remarks about the absence of the first defendant at the time judgment in default was given against himself.

My attention was drawn to the case of *Safety Insurance Co. Ltd.* v. *Hua Seng Electric Co.*[1] Each case has got to be decided on its own particular facts and in my view that case is very easily distinguished from the present case. I do not consider it necessary to refer to any authorities for the purposes of this appeal except to follow the observations of the Court of Appeal in the case of *Foo Chiew Fong* v. *Guriman*[2] where Mathew C.J. delivering the judgment of the Court of Appeal said:

"Courts prefer that cases should be decided on their merits and do not invoke procedural rules to prevent a defendant from defending an action unless the defendant has no merits in his application for a postponement. The learned judge on appeal would have regarded the defendant's application with greater favour had he disclosed his defence at the time he applied for a postponement. But that consideration is not in my view material, as it was not an application to set a default judgment aside, in which case he must disclose an issue to be tried...."

In the present case the defence of the first defendant raised questions of law which it was the duty of the court to determine if the action was to be decided on merits. All that the first defendant was required to do was to show a good cause for his absence in court on the 6th January 1970 and his application being an application to set aside a default judgment to refer to his defence. This he did. In exercising their discretion it is the duty of the courts to exercise that discretion judicially, that is in accordance with commonsense and in doing so should bear in mind all that may promote justice and not defeat it. If discretion is exercised otherwise, it may only tend to strike at the root of justice or result in injustice being done. I am furthermore of the view that every opportunity should be given to the litigants to put forward their cases and that they have a right to be heard within the limits prescribed by law if they do not violate any of the principles of procedure that the law has laid down. They have a right to be heard and it is the function of the courts to see that no unnecessary shackles are put on them by such rules of procedure which empower the courts to exercise the discretion one way or the other especially if one of the parties concerned can be adequately compensated by costs.

I am of the view that the learned president did not exercise his discretion in a judicial manner and what he did was in fact in complete disregard of the evidence he had before him and which alone he was supposed to consider. In view thereof I will allow this appeal with costs to be paid by the respondent to the appellant. The plaintiff/respondent will, however, have the costs of the application which the first defendant made before the learned president and those costs will be assessed by the learned president in accordance with the provisions of the Second Schedule to the Subordinate Courts Rules.

Appeal allowed.

Solicitors: *Tay Leong Siak & Co.; Devadas & Co.*

ABDUL WAHAB v. PUBLIC PROSECUTOR

[A.Cr.J. (Sharma J.) May 29, 1970]

[Malacca — Criminal Appeal No. 10 of 1970]

Criminal Law and Procedure — Trial — Sentence — Power of magistrate to award full punishment for offence of which a person has been convicted — Courts Ordinance, 1948, s. 87(2).

Penal Code, s. 457 — House-breaking in order to commit theft — Record of previous convictions — Sentence — Full punishment authorised by law.

The appellant had been convicted under section 457 of the Penal Code for having committed house-breaking in order to commit theft. He had twelve previous convictions. The learned magistrate sentenced him to 2 years' imprisonment and six strokes of the rattan to be followed by twelve months of police supervision.

Held: (1) the learned magistrate should have acted under section 87(2) of the Courts Ordinance which gives power to a first class magistrate to award the full punishment authorized by law for the offence of which a person has been convicted;

(2) in this case the term of imprisonment should be increased to 10 years.

Cases referred to:-

(1) *Public Prosecutor* v. *Viran* [1947] M.L.J. 62.

(2) *Sultan bin Rahmansa* v. *R.* [1955] M.L.J. 75.

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

Ahmad bin Haji Abdul (Deputy Public Prosecutor) for the respondent

Sharma J. (delivering oral judgment): The appellant in this case was charged under section 457 of the Penal Code for having committed house-breaking in order to commit theft. The accused pleaded guilty after having fully understood the nature and consequences of his plea. According to the charge, he entered into the house in question by scaling its back wall between the hours of 1.30 a.m. and 6.30 a.m He not only committed house-breaking but, after having gained entry into the house, committed theft of certain articles belonging to the occupant of the house, the total value of which as given by the prosecution was $1,415.

The appellant had 12 previous convictions the first of which was while he was a juvenile and the offence committed by him then was one under section 380 of the Penal Code. He continued his record of committing thefts up to the year 1950 when he was put under police supervision. He seems to have ignored even the provisions of law which govern the conduct of a police supervisee. I need not go into the other convictions which disfigure and display the character of the appellant to an extremely ugly and detestable degree but I need only mention that on the 8th day of June 1961 he was convicted in Singapore under section 457 of the Penal Code and sentenced to 5 years' imprisonment. He got out of the prison and was again convicted in 1966 for house-breaking under section 456 of the Penal Code and sentenced to 2 years' imprisonment.

The learned magistrate convicted the appellant and sentenced him to 2 years' imprisonment and six strokes of the rattan to be followed by 12 months of police